

PUBLIC UTILITIES COMMISSION

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June 10, 1996

VIA FEDERAL EXPRESS

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20036

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Re: CC Docket No. 96-115

Dear Mr. Caton:

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Please find enclosed for filing an original plus eleven copies of the COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA ON THE NOTICE OF PROPOSED RULEMAKING in the above-referenced docket.

Also enclosed is an additional copy of this document. Please file-stamp this copy and return it to me in the enclosed, self-addressed postage pre-paid envelope.

Yours truly,

Mary Mack Adu

Mary Mack Adu
Attorney for California

MMA:cdl

Enclosures

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ORIGINAL

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)

Implementation of the)
Telecommunications Act of 1996)
Telecommunications Carriers' Use)
of Customer Proprietary Network)
Information and Other Customer)
Information)

CC Docket No. 96-115

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**COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA
AND THE PUBLIC UTILITIES COMMISSION OF THE STATE
OF CALIFORNIA ON THE NOTICE OF PROPOSED RULEMAKING**

I. INTRODUCTION

The People of the State of California and the Public Utilities Commission of the State of California ("CPUC" or "California") hereby respectfully submit these comments on the Notice of Proposed Rulemaking ("NPRM") issued by the Federal Communications Commission ("FCC") relative to the implementation of the Telecommunications Act of 1996 and Customer Proprietary Network Information (CPNI).¹ Section 702 of the 1996 Act which adds a new Section 222 to the Communications Act of 1934 places greater restrictions on the use of customers' CPNI. From a policy standpoint, California has favored stricter CPNI requirements than the federal requirements that predate the 1996

1. CPNI encompasses any information about customers' network services and their use of those services that a telephone company possesses because it provided those network services. It includes such information as a customer's name, address, usage data and calling patterns, and billing history.

Act. For example, the CPUC has urged the FCC to "restrict access to a customer's CPNI by any provider unless the customer notifies the LEC in writing to the contrary...Adoption of this type of rule more justly balances privacy, competitive equity and efficiency concerns." Comments of the People of the State of California, CC Docket No. 90-623, Computer III Remand Proceedings, p. 10. While the CPUC has advocated for stronger CPNI user restrictions, the CPUC is fully aware and supportive that new competitors need access to data of the incumbent local exchange carriers. Section 222 appropriately balances the needs of consumers and competitors. The CPUC believes that its authorization and notification requirements for the disclosure of CPNI are consistent with the 1996 Act and should be allowed to continue.

II. DISCUSSION

A. The 1996 Act Requires the FCC to Balance Competition with Consumer Privacy Concerns As They Relate to CPNI.

By adding Sections 222 and 275(d) to the 1996 Act, Congress sought "to balance both competitive and consumer privacy interests with respect to CPNI." Joint Explanatory Statement, p. 205. Prior to the 1996 Act, in Computer II and Computer III proceedings, the FCC established rules for the use of CPNI in the marketing of enhanced services and customer premises equipment (CPE). Under these rules, the Bell Operating Companies (BOCs) had unrestricted access to their customers' CPNI. The rules allowed the BOCs to use their customers' CPNI unless the customer requested confidentiality. Customers were not notified of their

option to request confidentiality.² On the other hand, enhanced service providers (ESPs) not affiliated with the BOCs were required to obtain prior customer authorization in order to get access to the CPNI already in possession of the BOCs.

In the Remand Order of Computer III, both BOCs and competitors were required to obtain prior written customer authorization before using the CPNI of customers with more than 20 lines. However, the CPNI of customers that subscribed to 20 or fewer lines could be used without prior written authorization. Residential and small business customers did not enjoy the same level of protection as did larger customers.

The FCC established CPNI rules prior to the 1996 Act that preempted state CPNI rules requiring prior authorization, asserting that such state rules would negate federal policies promoting efficiency. In California III, supra, at 933, the Ninth Circuit upheld the FCC, holding that state rules would negate the FCC's goal of allowing the BOCs to develop efficiently a mass market for enhanced services for small customers.³

2. The court in People of State of Cal. v. FCC, 39 F.3d 919, 930 (9th Cir. 1994) (hereinafter, California III.) noted that unless customers were notified that they have the option to request confidentiality of their CPNI, it would mean that "for the most part the BOCs had unrestricted access to CPNI by default."

3. The court reaffirmed that the only exception to state jurisdiction over intrastate telephone matters is "when the state's exercise of that authority negates the exercise by the FCC of its own lawful authority over interstate communication." California III, supra, p. 931, citing National Ass'n of Regulatory Util. Comm'rs v. FCC, 880 F.2d 422, 429 (D.C.Cir. 1989).

The inclusion of Sections 222 and 275(d) to the 1996 Act changes the landscape with regard to the treatment of CPNI. We agree with the FCC that "[t]o the extent that the 1996 Act requires more of a carrier, or imposes greater restrictions on a carrier's use of CPNI, the statute, of course, governs." NPRM, ¶3. Section 222 (c) (1) of the 1996 Act generally requires customer authorization, without regard to the size of the customer, before a carrier can use CPNI for any purpose other than providing the service from which the information was derived:

"(1) PRIVACY REQUIREMENTS FOR TELECOMMUNICATIONS CARRIERS. - Except as required by law or with the approval of the customer, a telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service shall only use, disclose, or permit access to individually identifiable customer proprietary network information in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories."

Small customers no longer have to affirmatively request confidentiality. Rather, the burden is now on the carrier to obtain prior customer approval before using CPNI.

The 1996 Act provides even greater protection against the use of information garnered through the use of alarm monitoring services. Section 275 prohibits the LECs from recording or using the occurrence or contents of calls received by providers of alarm monitoring services for the purpose of marketing such

services themselves or on behalf of any other entity. This appears to be a blanket exclusion of the use of information obtained through alarm monitoring services.

B. The FCC Should Enact CPNI Rules That Allow States Flexibility in Protecting Their Customers' Expectation of Privacy and Balancing Competition Consistent with Congressional Intent.

The Commission seeks comment on the extent to which Section 222 allows states to impose additional CPNI requirements. NPRM, ¶17. Our reading of the 1996 Act is that Congress intended for regulators to balance privacy rights with competition in telecommunications markets. In achieving this balance, regulators must be aware of customers' expectations about privacy which may vary by community; to what extent markets have developed in different communities; and the needs of telecommunications carriers for information to promote market development. To accomplish these objectives, states should have the flexibility to establish rules that protect customers' expectation of privacy, while simultaneously not negatively impacting competition. Regulatory solutions tailored to local market conditions are not automatically harmful to the development of a seamless, national telecommunications network.

We believe that California's CPNI rules are consistent with the 1996 Act in protecting privacy rights without dampening competition. California Public Utilities (PU) Code §2891 forbids a telephone company from disclosing a residential customer's CPNI without first obtaining written consent. While Section 222(c)(1) requires customer approval, oral or written, before a

telecommunications carrier shall use a customer's CPNI, the FCC can strengthen rules that protect both customers and carriers by requiring written approval. Moreover, PU Code §2891 appears to be consistent with the spirit of the 1996 Act which is broader than §2891 because the latter is limited to residential customers, while the 1996 Act does not specify that the customer be a "residential" customer.⁴ Notwithstanding the importance of privacy in California, the CPUC is laying the groundwork, and the markets are ripe, for competition to flourish here. Accordingly, the CPUC urges the FCC not to preempt California's CPNI rules.

**C. The CPUC Agrees With The FCC's Interpretation
of the Meaning of "Telecommunications Service."**

Without prior customer authorization, Section 222(c) provides that telecommunications carriers shall only use, disclose, or permit access to individually identifiable CPNI in its provision of the telecommunications service from which such information is derived or in its provision of services necessary to or used in the provision of such telecommunication service.

4. The 1996 Act appears to validate California's well-developed expectation of privacy, which is an inalienable right in California. See, Cal. Const. art I, §1. The California legislature has also passed other statutes intended to protect privacy in the telecommunications marketplace, including PU Code §2891.1 which prohibits a telephone corporation from selling of licensing lists that include residential unlisted numbers, and §2893 which allows a telephone caller to withhold display of the telephone number on an individual basis in the event that the called party has Caller ID.

As stated in NPRM, ¶20, the definition of the term "telecommunications service" does not provide guidance as to its scope.⁵ Nor does the Joint Explanatory Statement in the Conference Report shed any light on the scope of the term.

This vacuum leaves room for different interpretations. The NPRM notes that some have interpreted the term broadly to include all services that the Commission has classified as "basic" services. This interpretation allows providers of telecommunications service to use, without prior customer authorization, CPNI obtained from any such service to market any other telecommunications service. The FCC "believe[s] however, that a close reading of Section 222 does not support this interpretation." NPRM, ¶20. The CPUC agrees with the FCC on this point. Sections 222(b) and (c)(1) together support the interpretation that a telecommunications carrier is barred from using CPNI obtained while providing telecommunications service for any purpose other than providing that service.

D. The CPNI Provisions of Section 222 and Data Safeguards Provision of Section 275(d) By Themselves Do Not Give the Commission Jurisdiction Over Interstate And Intrastate Use and Protection of CPNI.

The FCC asks for comment on whether the CPNI provisions of Section 222 and the data safeguards provision of Section 275(d)

5. The Act defines "telecommunications service" as the offering of telecommunications for a fee directly to the public or to such classes of users as to be effectively available directly to the public regardless of facilities used. 47 U.S.C. §153(46).

may by themselves give the FCC jurisdiction over both interstate and intrastate use and protection of CPNI and other customer information.⁶ NPRM, ¶18. The CPUC fails to see how these provisions, in and of themselves, give the FCC jurisdiction over interstate and intrastate use and protection of CPNI. The CPUC does not find support in the 1996 Act, or in the Joint Conference Statement to support that interpretation. As explained in Section II(b) above, balancing competition while protecting privacy interests is more efficiently accomplished at the state level, in coordination with federal goals. States can more efficiently ascertain and balance their citizens' privacy expectations with the competitive markets in that state without thwarting the regulation of interstate telecommunications.

E. The CPUC Agrees With the FCC that Section 222(e) Should Apply to Any Telecommunications Carrier.

The FCC also seeks comment regarding the scope of its authority with respect to subscriber list information as set out in Section 222(e). NPRM, ¶19. This section provides that subscriber list information shall be made available by telecommunications carriers that provide telephone exchange service on a timely and unbundled basis to any person, upon request, for the purpose of publishing directories. This

6. Section 275(d) specifically provides that "A local exchange carrier may not record or use in any fashion the occurrence or contents of calls received by providers of alarm monitoring services for the purposes of marketing such services on behalf of such local exchange carrier, or any other entity."

information shall be provided under nondiscriminatory and reasonable rates, terms, and conditions. States should play an active role in ensuring compliance with this section. In California, the CPUC has ordered to incumbent LECs and non-incumbent LECs to provide subscriber lists on an unbundled basis, under nondiscriminatory reasonable rates, terms, and conditions to any person for the purpose of publishing directories in any format, subject to the requirements of PU Code Sections 2891 and 2891.1 (D.96-02-072, Appendix E, Page 16). The FCC interprets Section 222(e) to require not only LECs, but also any telecommunications carrier, including an interexchange carrier or cable operator, to the extent that such carrier provides telephone exchange service, to meet the requirements of this section. NPRM, ¶43. The CPUC concurs with this interpretation because it promotes equal access, competition, and nondiscrimination.

F. Customer Notification of the Right to Restrict Access to Their CPNI Is Essential to Protecting the Right of Approval.

Customer authorization is required before a carrier that obtains CPNI can use that CPNI for purposes unrelated to the service from which it is obtained. Section 222(c)(1). The FCC tentatively concludes that a telecommunications carrier seeking customer approval for CPNI use should be required to notify customers of their rights to restrict access to their CPNI. NPRM, ¶28. We agree with the FCC that customers must be informed prior to making a decision that they can restrict access to their

CPNI, otherwise customers cannot be considered to have approved or waived their right of approval.

Further comment is sought on whether customer notification should be given orally or whether advance written notification should be required. NPRM, ¶28. The FCC seeks comments as to which form of written notification is least burdensome and still meets the objectives of the 1996 Act. For many years, the CPUC has required bill inserts to inform customers when they have choices about their phone service. Specifically, the CPUC has used bill inserts to inform customers that calling 800 numbers would reveal their telephone numbers and choices about Caller ID blocking options. In both cases, customers were informed about how using telecommunications services would affect information that customers expected to be kept confidential in advance of any changes that were contrary to their expectations.

The CPUC strongly advocates the use of bill inserts to inform customers about their right to keep CPNI confidential. Bill inserts have a proven effectiveness in reaching customers and are relatively non-burdensome. In the CPUC's Caller Id education program, the LECs were concerned about the burdens of verifying that customers have received bill inserts, not about issuing inserts. It would be helpful for the FCC to specify the information to be contained in the insert, but to allow states to work with carriers on developing the actual format.

**G. California's CPNI Authorization Rules Are Not
Inconsistent with the 1996 Act**

The FCC seeks comments on authorization requirements including what forms of authorization may be used, how authorization should be obtained and other reasonable restrictions. The FCC notes that written authorization could take the form of a letter or billing insert that contains a summary of the customer's CPNI rights, accompanied by a postcard, that the customer would sign and return to the carrier to authorize CPNI use. Id. at ¶29. It is also suggested that authorization may be obtained orally. We agree with the FCC that written authorization would provide greater protection to both customers and the carrier than oral authorization and is the requirement that all parties must meet when obtaining CPNI from residential customers. Since written authorization can be obtained with relative efficiency, is not anticompetitive and, at the same time, protects consumers and carriers, it is preferable to oral authorization.

The FCC tentatively concludes that companies bear the burden of proof when authorizations are obtained orally. We agree. If the FCC determines that oral authorization is permissible, the CPUC recommends that some requirements and/or restrictions on the process are appropriate. These restrictions could be modeled after both the FCC's and CPUC's "slamming" rules which govern another area where customers are required to make informed

decisions.⁷ In these solicitations, California has allowed carriers to solicit customers orally, but has imposed restrictions to ensure that customers make informed decisions. California's rules require that solicitations by oral means require verification by a third party that does not earn a commission from the sale. After a successful solicitation, the company must send a letter verifying the customer's choice.

The CPUC proposes that when customers authorize a party to use CPNI orally, the company soliciting the authorization must verify with an independent third party and that customers that choose to not exercise their right, should be sent a follow up letter. While these restrictions may seem burdensome, prior experience with telephone solicitations for both changing carriers and the marketing of services indicate that fraud is a pervasive problem. These restrictions balance the needs of carriers to easily solicit authorization with customers' desire to make informed decisions.

III. Conclusion

For the reasons stated, the CPUC urges the FCC not to preempt state regulation intended to protect consumers' CPNI rights and simultaneously foster competition, consistent with the

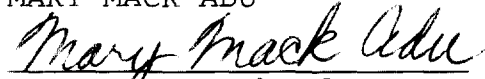
7. The CPUC supports pending legislation in California that would require third party verification of oral requests for changes in providers of all residential telephone services (CA Senate Bill 1140). This legislation strengthens rules deterring slamming as applied to residential customers, and foresees the potential for slamming in the provision of local exchange telephone service as that market emerges.

1996 Act and in coordination with the FCC's goals. If the FCC determines that California's CPNI rules are not consistent with Section 222 of the 1996 Act, the CPUC urges the FCC to carefully balance the rights of customers under Section 222 with those needs of competitors that are essential to the development of competitive markets. The CPUC believes that after this examination, the FCC will agree that customers must be noticed of their rights prior to an authorization request and that special requirements for oral authorizations are reasonable and necessary to prevent abuses.

Respectfully submitted,

PETER ARTH, JR.
EDWARD W. O'NEILL
MARY MACK ADU

By:


Mary Mack Adu

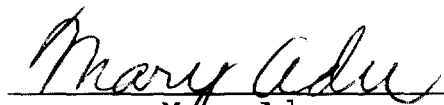
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June 10, 1996

CERTIFICATE OF SERVICE

I, Mary Adu, hereby certify that on this 10th day of June, 1996 a true and correct copy of the foregoing COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA ON THE NOTICE OF PROPOSED RULEMAKING was mailed first class, postage prepaid to all known parties of record.


Mary Adu